

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 342

BLAZEY CZAPLICKI, PETITIONER,

vs.

THE VESSEL "SS HOEGH SILVERCLOUD" HER
BOILERS, ENGINES, TACKLE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

SUPREME COURT OF THE UNITED STATES

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**UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

A. 173-113

BLAZEY CZAPLICKI, Libelant,

VS.

SS. HOEGH SILVERCLOUD, Her Boilers, etc., and OIVIND
LORENTZEN, as Director of Shipping and Curator of the
Royal Norwegian Government, Doing Business Under the
Name and Style of Norwegian Shipping and Trade Mis-
sion, Kerr Steamship Company, Inc., and Hamilton
Marine Contracting Company, Inc., Respondents

Trial Record of Proceedings of April 20, 1954

Before Hon. Sylvester J. Ryan, District Judge

New York, April 20, 1954;

10:30 o'clock a. m.

APPEARANCES

Nathan Baker, Esq., Proctor for Libelant.

Galli & Locker, Esqs., Proctors for Hamilton Marine Con-
tracting Company; Ralph H. Terhune, Esq., of Counsel.
[fol. 3] Haight, Deming, Gardner, Poor & Havens, Esqs.,
Proctors for Oivind Lorentzen, as Director of Shipping and
Curator of the Royal Norwegian Government, doing busi-
ness under the name and style of Norwegian Shipping and
Trade Mission; Francis X. Byrn, Esq., of Counsel.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Are all sides ready?

Mr. Baker: Yes, sir.

The Court: I have examined the pleadings in this case
and the record in this case, and I think that before we try
the issue of negligence we should first inquire into the suf-

iciency and have a preliminary hearing on the sufficiency of the fifth separate and complete defense pleaded by Hamilton Marine Contracting Company. That same defense has also been interposed by the Norwegian Shipping and Trade Mission.

Mr. Baker: And by Kerr Steamship Company.

The Court: And by Kerr Steamship Company, the agent. Is there any difference of opinion, gentlemen, with reference to the method of procedure that I have suggested?

Mr. Terhune: I have none.

The Court: Now, Mr. Baker, the separate defense pleaded [fol. 4] by Hamilton Marine Contracting Company is essentially the same defense that has been pleaded by Norwegian Shipping and Trade Mission and was pleaded by the Kerr Steamship Company; is that correct?

Mr. Baker: It is the same defense. In other words, they have set up there that by reason of the formal award in the Compensation Commission there has been an assignment of the cause of action to the employer or the Travelers Insurance Company, the insurance carrier for the employer.

The Court: Now, do you admit the allegations of this defense as it has been pleaded, or do you dispute those allegations?

Specifically does the libelant admit that at the time and place set forth in the libel the libelant was engaged in a maritime employment and was the employee of the Northern Dock Company, Inc., within the meaning of the Longshoremen's and Harbor Workers Compensation Act, Title 33, U. S. C., Sections 901 et seq.?

Mr. Baker: We admit that.

The Court: Do you admit that the employer, the Northern Dock Company, had prior to the time of the alleged accident and prior to September 6, 1945 duly complied with the provisions of the Act and secured compensation insurance [fol. 5] protecting the libelant as an employee?

Mr. Baker: We admit that.

The Court: Do you admit that subsequent to the happening of the accident pleaded in the libel the libelant duly filed a claim for compensation with the United States Employee's Compensation Commission?

Mr. Baker: We admit that.

The Court: Do you admit that thereafter and on September 28, 1945, the Deputy Commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the Compensation Act?

Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel.

Mr. Terhune: As to that, if your Honor please, all that I can admit is that according to the record of the United States Employee's Compensation Commission, at the time the libelant here-in accepted the compensation, he was not represented by counsel but appeared personally and was [fol. 6] advised of his rights on the 27th of September, 1945, according to the file of the Commission, by Mr. D. B. O'Keefe, and thereafter filed his claim, and a formal order was issued.

And as to that I would ask your Honor to receive in evidence the forms and data contained in the file; that is, the employee's claim for compensation dated September 27, 1945—I assume it was intended to be although they have not inserted the "5" after the "4."

Also Mr. O'Keefe, the claims examiner for the Commission's memorandum for the file, and the order and award of September 28, 1945.

The Court: We will receive those in evidence and we will mark them as Libelant's exhibits. Do you object to them being received as libelant's exhibits?

Mr. Baker: No objection.

Will counsel still admit that there was no hearing? In the award it says, "No hearing."

Mr. Terhune: Apparently that is correct. The man was not represented by any attorney nor was any hearing held. An order was entered on his own application.

The Court: Let us specify now what papers we are receiving as libelant's exhibits. Put them on the record.

[fol. 7] Mr. Terhune: The employee's claim for compensation.

The Court: That is Libelant's Exhibit No. 1.

(Marked Libelant's Exhibit 1.)

Mr. Baker: I don't know if I can stipulate to this one, your Honor.

The Court: Just tell me what papers you are putting in evidence. That is all I want to know. What is the second paper you are putting in evidence?

Mr. Baker: I can't put this in evidence, your Honor.

Mr. Terhune: I ask that it be marked for identification.

The Court: That will be marked Respondent Hamilton's Exhibit A for identification.

(Marked Respondent Hamilton's Exhibit A for identification.)

The Court: And that is what?

Mr. Terhune: That is a memorandum for the file, contained in the file of the Commission, apparently dictated by D. B. O'Keefe, claims examiner, and I would like to read it into the record as well, if I may.

The Court: We are going to have it marked.

[fol. 8] Do you want to offer it in evidence as your exhibit?

Mr. Terhune: I will offer it as a respondent's exhibit.

The Court: And as part of the official records of the Compensation Commission?

Mr. Terhune: Of the Commission, yes.

The Court: Is there any objection?

Mr. Baker: Well, I object on the ground that I think Mr. O'Keefe, who is still with the Commission, should be produced.

Mr. Terhune: Well, he is available, as I understand it, and subject to a telephone call if needed.

Mr. Baker: I don't see how I can stipulate—

The Court: I will receive it as part of the official records of the Compensation Commission. That does not preclude either side from calling him. That will be Respondent's Exhibit A in evidence.

(Respondent Hamilton's Exhibit A for identification received in evidence.)

The Court: What other papers does libelant desire to have marked in evidence?

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Mr. Baker: Compensation order, award of compensation.

The Court: That will be marked Libelant's Exhibit 2.

[fol. 9] Mr. Terhune: With proof of service.

Mr. Baker: Yes.

The Court: It will be received.

(Marked Libelant's Exhibit 2.)

The Court: Does libelant desire to offer any other papers in evidence?

Mr. Baker: Will your Honor give me a moment to look through this record?

(Short pause.)

Mr. Baker: I would like to offer in evidence the first report of the employer, Northern Dock Company, dated September 6, 1945.

Mr. Terhune: No objection.

(Marked Libelant's Exhibit 3.)

Mr. Baker: I offer in evidence the claim of the Travelers Insurance Company that the claim will be controverted, dated September 17, 1945.

Mr. Terhune: Well, I think that counsel has miscalled the document, but I have no objection to the document being received.

It is called at the top, a notice that the claim will -- controverted, but when the Court examines it under Section D it appears, "Injured is undecided whether or not to sue the third party."

The Court: It will be received.

[fol. 10] (Marked Libelant's Exhibit 4.)

Mr. Baker: I offer in evidence this letter of D. B. O'Keefe, claims examiner, dated September 28, 1945, addressed to the Travelers Insurance Company.

Mr. Terhune: No objection.

The Court: It will be received in evidence.

(Marked Libelant's Exhibit 5.)

Mr. Baker: I would like to call the Court's attention to the fact that that appears to be the same date that the formal award of compensation was entered.

Offer in evidence this letter from the Compensation Commission dated December 5, 1945, together with the writing thereon.

The Court: A letter addressed to whom?

Mr. Baker: Addressed to Czaplicki by Mr. O'Keefe, claims examiner.

Mr. Terhune: I have no objection to that.

(Marked Libelant's Exhibit 6.)

Mr. Baker: That is all.

The Court: Is that all?

Mr. Baker: That is all on this compensation record.

The Court: Is it stipulated that the libelant's employer, the Northern Dock Company, and the insurance company, Travelers Insurance Company, paid to the libelant as com-[fol. 11] pensation under the award of September 28, 1945, compensation for two weeks at \$22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of \$45, and continued thereafter to make by-weekly installment payments of \$22.50 per week until the disability ceased?

Mr. Baker: It is stipulated that payments were made under that order and award, and according to the record it would indicate they made payments of temporary total disability I think for seven weeks.

The Court: That they did pay for seven weeks and that the libelant received seven weeks' disability under the award; is that conceded?

Mr. Baker: That they paid a total of seven weeks and one day temporary total disability or \$160.72.

The Court: Under the award?

Mr. Baker: Yes, under the award.

The Court: Has the libelant any proof of any fraud that it desires to submit to the Court?

Mr. Terhune: I object to such proof—

The Court: I just want to inquire and then I will hear your objection if an offer is made.

[fol. 12] Mr. Baker: We have no such evidence at this time, your Honor.

The Court: Have you any further evidence on the issue raised by this defense?

Mr. Baker: I would like to have counsel stipulate that the third party defendant, the Hamilton Marine Contracting Company, which is being sued in this case, is insured by the Travelers Insurance Company, which is the same insurance carrier who insured the employer, the Northern Dock Company.

The Court: In view of your statement that you desire to submit no proof of fraud I do not see how such a concession would be relevant.

Mr. Baker: Would counsel concede it for the record so that it could be passed upon, if necessary, by a higher court?

The Court: What could be passed upon?

Mr. Baker: I would like to have that in the record, your Honor, for the purposes of a possible appeal in this case.

Mr. Terhune: I will state that my position is that it is wholly irrelevant in this action, without either admitting or denying the truth of the facts.—

Mr. Baker: It is conceded?

Mr. Terhune: No, I cannot make that concession on this [fol. 13] record. I don't think it has any place in it.

The Court: Has the libelant any further proof?

Mr. Baker: I offer in evidence the deposition of the Travelers Insurance Company which was taken June 25, 1953.

Mr. Terhune: I object to it.

Mr. Baker: Does your Honor have the original in the file?

Mr. Terhune: I shall object to it upon the ground that it is neither relevant or competent to the issue in this case.

The Court: Do you object to its competency as to the regularity in which it was taken?

Mr. Terhune: Not at all.

The Court: You simply object to it as being irrelevant?

Mr. Terhune: Irrelevant.

The Court: And immaterial?

Mr. Terhune: That is correct.

The Court: I am going to take it. I feel that it is irrelevant and immaterial in view of the statement of counsel that

he makes no charge of fraud on behalf of the libelant concerning the award of compensation, but I will take it so [fol: 14] that there might be a complete record.

Mr. Terhune: Surely.

The Court: And the objection is overruled.

(Marked Libelant's Exhibit 7.)

Mr. Baker: If counsel will not admit that—

The Court: I have received it in evidence.

Mr. Baker: If counsel will not admit that the Travelers Insurance Company also is the insurance carrier for the Hamilton Marine Contracting Company, I don't like to do this, but if there is a representative of the Travelers Insurance Company here, I can call him.

The Court: Perhaps they will stipulate that if someone were called he would so testify.

Mr. Terhune: It is a true fact, as I indicated to your Honor before, but I do not concede—

The Court: You say it is immaterial and irrelevant?

Mr. Terhune: That is correct.

The Court: But if I rule that it is material and relevant or that I will take it irrespective of its relevancy or materiality, you will concede that to be the fact?

Mr. Terhune: Oh, to the truth, sir, no question about that. [fol. 15] The Court: And I will take notice of that and make that concession part of the record, with the understanding that the respondent objected to it as being immaterial and irrelevant.

I personally also feel, in view of libelant's position that no charge of fraud is made here in connection with the award that it is immaterial and irrelevant, but I will take it so that the record may be complete.

Mr. Baker: At this time, if your Honor please, I had planned to subpoena the file of the Northern Dock Company or the Travelers Insurance Company, who were the insurance carrier for Northern Dock Company so that I could examine it and then offer into evidence such documents as I deem pertinent to this hearing.

The Court: This is a trial.

Mr. Baker: Yes.

The Court: We are trying this libel preliminary to the

trial of the allegations of negligence. I felt that in view of the prior decisions which have been made in this case by my brother judges that I should first inquire into the sufficiency of the separate defenses that have been pleaded.

What is the purpose of getting the file of the Travelers Insurance Company and offering a lot of papers? On what [fol. 16] issue do you desire to offer them?

Mr. Baker: On the issue as to when they first received notice that they were the same insurance carriers, both for the compensation carrier and the Hamilton Marine Contracting Company.

The Court: I assume that they received notice at the time they wrote the policies and both the policies were written prior to the accident on which this libel is based.

Mr. Baker: Unless counsel is ready to admit as to when the Northern Dock Company, or when the Travelers Insurance Company on the claim of the Hamilton Marine first had notice—

The Court: I understand that his confession is that prior to the accident upon which this claim is based the Travelers were the insurers of both risks.

Mr. Baker: All right, that will be all.

The Court: Libelant has no further proof to offer?

Mr. Baker: Off this—

The Court: On the special trial which we are conducting first of the issues raised by the separate defense.

Mr. Baker: That is all on that issue.

The Court: All right. Have the respondents any additional [fol. 17] proof they desire to submit in connection with this trial of the special issue raised by the separate defense?

Mr. Terhune: No, if your Honor please. The respondents will rest on that issue and move for judgment dismissing the libel on that issue.

The Court: The respondent Hamilton Marine Contracting Company?

Mr. Terhune: That is correct.

The Court: How about the other respondent, the Norwegian Shipping and Trade Mission?

Mr. Byrn: I would like to make a statement on the record. We represented originally two respondents, the Kerr

Steamship Company, which libel has been dismissed as to Kerr Steamship Company in an opinion by Judge Sugarman, and a similar motion made in behalf of the Norwegian Shipping and Trade Mission, and that was also referred to Judge Sugarman, and it was stipulated between Mr. Baker and ourselves that that motion will be held in abeyance pending an appeal that Mr. Baker has taken from the dismissal as against Kerr Steamship Company.

The Court: There can be no appeal heard until all the issues in the case have been disposed of. My specific question now is, do you desire to present any evidence in support [fol. 18] of the separate defense that you have presented?

Mr. Byrn: Well, that stipulation had existed up until this morning. This morning I said that we would renew our motion in behalf of the Norwegian Shipping and Trade Mission.

The Court: You now renew your motion to dismiss?

Mr. Byrn: I renew my motion and I would also like to make another statement as to the negligence aspect of this case.

The Court: I am not trying that issue at this time. I am first trying as a special issue the question raised by the defense.

Mr. Byrn: But I would like to remove myself from that other issue, your Honor, because that was the agreement that I had with Mr. Baker, that we would not participate in the trial of that.

The Court: I am not trying that at this point. We will reach that point in a few moments. If I sustain this defense that will dispose of the libel.

Mr. Byrn: May I say that our objection was taken by exceptions and not by—

The Court: By exceptive allegations?

Mr. Byrn: Yes, sir.

The Court: And the Hamilton Marine Contracting Company [fol. 19] took their objections by way of defense in their answer?

Mr. Terhune: That is right, sir.

The Court: And all rest then on the special issue raised by this defense: is that correct, gentlemen?

Mr. Terhune: That is correct.

ORAL OPINION

The Court: I find that the law of this case has been settled by the opinion of my brother judges. Judge Sugarman, by his decision rendered on December 11, 1952, sustained the exceptions and exceptive allegations of the respondent Kerr Steamship Company to the libel filed herein upon the same grounds as are pleaded in the second defense of Hamilton Marine Contracting Company and pleaded in the exceptive allegations of the Norwegian Shipping and Trade Mission.

The law on the case has also been set by a decision of my brother Judge Goddard, rendered on November 30, 1953 when he denied a motion made by the libelant herein to strike this separate defense from the answer of Hamilton Marine Contracting Company, Inc.

I find, therefore, that this libel must be dismissed on the conceded facts here and on the law of the case as it has been established by my brother judges, and I therefore hold that the separate defense of Hamilton Marine Contracting Company, Inc., must be sustained, and that the exceptions and [fol. 20] exceptive allegations of the respondent Norwegian Shipping and Trade Mission must be sustained, and conclude that the libelant is barred by having elected and received a formal compensation award and benefits under Title 33, U. S. Code, Sections 901 et seq., and the libel is therefore dismissed without costs as to these two remaining respondents, Norwegian Shipping and Trade Mission and Hamilton Marine Contracting Company, Inc.

An appropriate decree may be submitted.

All right, gentlemen.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 21]

[File endorsement omitted]

IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK

The Libel and Complaint of BLAZEY CZAPLICKI
against

The Vessel, "SS. HOEGH SILVERCLOUD", Her Boilers, Engines, Tackle, Apparel and Furniture and Against All Persons Claiming Any Interest Therein, and Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc. and Hamilton Marine Contracting Company, Inc., in a Cause of Action in Tort for Damages for Personal Injuries, Civil and Maritime, Alleges as Follows:

LIBEL BY SEAMAN UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SURETY PREPAYMENT OF COSTS OF FEES FOR ENFORCEMENT OF THE LAWS OF THE UNITED STATES, PROTECTION OF HEALTH AND SAFETY AT SEA—Filed June 12, 1952

First Cause of Action

First: Libellant, Blazej Czaplicki, is a resident of the City of Jersey City, County of Hudson and State of New Jersey, and is a citizen of the State of New Jersey, and of the United States of America.

[fol. 22] Second: The respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, was and still is a citizen of Norway, having an office and place of business in the Borough of Manhattan, City, County and State of New York.

Third: The respondent, Kerr Steamship Company, Inc., was and still is a corporation with an office and place of business in the Borough of Manhattan, City, County and State of New York.

Fourth: The respondent, Hamilton Marine Contracting Company Inc. was and still is a corporation with an office

and place of business in the Borough of Brooklyn, County of Kings, City and State of New York.

Fifth: The vessel "SS Hoegh Silvercloud" is now found, or during the pendency of this action will be found within the Port of New York and within the jurisdiction of this Honorable Court.

Sixth: At all times hereinafter mentioned, the respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, was the owner of, and was in possession of and operated, managed and controlled the vessel "SS Hoegh Silvercloud".

Seventh: At all times hereinafter mentioned, the respondent, Kerr Steamship Company, Inc., was in possession of and operated, managed and controlled said vessel, "SS Hoegh Silvercloud".

Eighth: At all times hereinafter mentioned, the respondent, Hamilton Marine Contracting Company, Inc., constructed a certain stairway or catwalk upon the deck of said vessel, "SS Hoegh Silvercloud".

[fol. 23] Ninth: At all times hereinafter mentioned, the respondent, Hamilton Marine Contracting Company, Inc., performed said construction work under the control, direction and with the participation of the respondents, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, and Kerr Steamship Company, Inc.

Tenth: On or about September 6, 1945, the libelant was employed as a longshoreman by Northern Dock Co., an independent stevedoring contractor, performing work upon said vessel while it was afloat in the navigable waters of the United States at Pier 3, Hoboken, New Jersey, and libelant was an invitee upon said vessel.

Eleventh: On or about September 6, 1945, while libelant was engaged in doing his work upon said vessel, and was ascending said stairway or catwalk, suddenly, due to the negligence, carelessness and recklessness of the respondents by their agents, servants and employees, and of the master, officers and crew of said vessel, one of the treads on the steps of said catwalk or stairway gave way, causing the

libelant to fall to the deck of said vessel and sustain serious injuries thereby.

Twelfth: Said accident was caused without any fault or neglect on the part of the libelant, but was caused wholly and solely by the defective, unsafe and unseaworthy condition of the vessel, and by the negligence of the respondents, their agents, servants, and employees, and by the negligence of the master, officers and crew of said vessel.

Thirteenth: That by reason of the premises aforementioned, the libelant was injured, bruised and wounded, so that he became sick, sore, lamed and disabled, and was, [fol. 24] upon information and belief permanently injured, and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing sums of money which he otherwise would have earned, and has expended and will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and has endured and will continue to endure great pain and suffering, all to his damage in the sum of Fifty Thousand (\$50,000.) Dollars.

Fourteenth: All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays,

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "SS Hoegh Silvercloud", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "SS Hoegh Silvercloud" her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs, and that:

2. Monitions issue to the respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., which are and may be served within the

jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid, and

[fol. 25] 3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as his damages with interest and costs against the respondents, as their several liabilities may appear, and

4. That the libelant herein may have such other and further relief in the premises as in the law and justice he may be entitled to receive.

Second Cause of Action

Fifteenth: Libelant, Blazey Czaplicki, repeats and alleges each and every allegation contained in those paragraphs of this libel and complaint marked and designated as "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth" of the First Cause of Action with the same force and effect as if set forth at length as part of this Second Cause of Action.

Sixteenth: On or about September 6, 1945, while libelant was engaged in doing his work upon said vessel, and was ascending said stairway or catwalk, suddenly, due to the unseaworthy condition of the vessel, one of the treads on the steps of said catwalk or stairway gave way, causing the libelant to fall to the deck of said vessel and sustain serious injuries thereby.

Seventeenth: That by reason of the premises aforementioned, the libelant was injured, bruised and wounded; so that he became sick, sore, lamed and disabled, and was, upon information and belief permanently injured, and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing sums of money which he otherwise would have earned, and has expended and [fol. 26] will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and had endured and will continue to endure great pain and suffering, all to his damage in the sum of Fifty Thousand (\$50,000.) Dollars.

Eighteenth: All and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "SS Hoegh Silvercloud", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "SS Hoegh Silvercloud", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs, and that:

2. Monitions issue to the respondents, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Keri Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid, and

3. That this Honorable Court May be pleased to decree the payment of the amount due as aforesaid to the libelant, [fol. 27] as his damages with interest and costs against the respondents, as their several liabilities may appear, and

4. That the libelant herein may have such other and further relief in the premises as in the law and justice he may be entitled to receive.

Nathan Baker, Proctor for Libelant, Office & P. O.
Address, 1 Newark Street, Hoboken, N. J. and
401 Broadway (Room 2201) New York City.

[fols. 28-29] *Duly sworn to by Blazey Czaplicki; jurat omitted in printing.*

[fol. 30]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ANSWER OF THE RESPONDENT, HAMILTON MARINE CONTRACT-
ING COMPANY, INC., TO THE LIBEL OF BLAZEY CZAPLICKI,
IN AN ALLEGED CAUSE OF ACTION IN TORT FOR DAMAGES FOR
PERSONAL INJURIES, CIVIL AND MARITIME—Filed July 22,
1952

Answering a First Cause of Action

First: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "First".

Second: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Second".

Third: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Third".

Fourth: It admits the allegations contained in article of the libel numbered "Fourth".

Fifth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Fifth".

Sixth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Sixth".

Seventh: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Seventh".

[fol. 31] Eighth: It admits that on September 6, 1945, it was engaged on board the "SS Hoegh Silvercloud" in constructing certain steps upon the deck of the said vessel, and except as admitted, it denies the allegations contained in article of the libel numbered "Eighth".

Ninth: It denies the allegations contained in article of the libel numbered "Ninth".

Tenth: It admits the allegations contained in article of the libel numbered "Tenth", except the allegation therein that libellant was an invitee upon said vessel, and as to

this allegation it denies that it has any knowledge or information sufficient to form a belief.

Eleventh: It denies the allegations contained in article of the libel numbered "Eleventh".

Twelfth: It denies the allegations contained in article of the libel numbered "Twelfth".

Thirteenth: It denies the allegations contained in article of the libel numbered "Thirteenth".

Fourteenth: It denies the allegations contained in article of the libel numbered "Fourteenth".

Answering a Second Cause of Action

Fifteenth: It repeats and reiterates all the admissions and denials herein contained.

Sixteenth: It denies the allegations contained in article of the libel numbered "Sixteenth".

Seventeenth: It denies the allegations contained in article of the libel numbered "Seventeenth".

Eighteenth: It denies the allegations contained in article of the libel numbered "Eighteenth".

[fol. 32] For a separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Nineteenth: That any injuries sustained by the libellant at the time and place set forth in the libel were caused by his own carelessness and negligence.

For a second, separate and complete defense to the complaint herein the respondent alleges upon information and belief:

Twentieth: That the cause of action alleged in the libel herein accrued more than two years prior to the commencement of this action, and is barred by the Statute of Limitations of the State of New Jersey.

For a third, separate and complete defense to the complaint herein the respondent alleges upon information and belief:

Twenty-first: That the cause of action alleged in the libel herein accrued more than three years prior to the commencement of this action, and is barred by the Statute of Limitations of the State of New York.

For a fourth, separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Twenty-second: That with notice of the facts and acts alleged in the libel, libellant refrained from commencing this action until on or about June 12, 1952, and has thereby been guilty of such laches as bars the libellant from maintaining this action.

For a fifth, separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Twenty-third: That at the time and place set forth in the libel, libellant was an employee of Northern Dock Company, Inc., and as such employee was engaged in performing his duties on board the "SS Hoegh Silvercloud", [fol. 33] a vessel of more than eighteen tons net then lying in the navigable waters of the United States.

Twenty-fourth: That at the time and place set forth in the libel there was and still is in full force and effect a statute of the United States known as the Longshoremen's and Harbor Workers' Compensation Act, being Title 33 U.S.C., Sections 901 et seq., as amended.

Twenty-fifth: That at the time and place set forth in the libel, libellant was engaged in the course of his employment in a maritime employment, and was an employee of Northern Dock Company, Inc., within the meaning of said compensation act.

Twenty-sixth: That the said employer had prior to September 6, 1945, duly complied with the provision of said law, and duly secured to its employees, including libellant, compensation, as provided in said compensation act, by insuring the payment of compensation with the Travelers Insurance Company, and that the said policy of insurance was in full force and effect at the time and place set forth in the libel.

Twenty-seventh: That subsequent to the happening of the accident set forth in the libel, libellant duly filed a claim for compensation with the U. S. Employees' Compensation Commission, Second Compensation District, and thereafter, and on September 28, 1945, the Deputy Commissioner, Second Compensation District, made an award and order directing the payment of compensation to the libellant in accordance with said compensation act.

Twenty-eighth: That thereafter, and in pursuance to such award the said employer, through its insurance carrier, The Travelers Insurance Company, duly paid the sums directed to be paid by said order and award, and that said payments operated as an assignment to the employer and/or its compensation insurance carrier, The Travelers Insurance Company, with all rights of the libellant herein to recover damages for the injuries set forth [fol. 34] in the libel.

Twenty-ninth: That by reason of the foregoing, the libellant is not the owner of the cause of actions alleged in the libel, and cannot maintain this action against the respondent.

Wherefore, the respondent, Hamilton Marine Contracting Company, Inc., demands judgment that the libel be dismissed as to it with costs and disbursements, and that it have such other and further relief as may be just.

Galli & Locker, Proctors for Respondent, Hamilton Marine Contracting Company, Inc. Office & P. O. Address, 80 John Street, New York 38, N. Y.

[fols. 35-36] *Duly sworn to by Frederic J. Locker. Jurat omitted in printing.*

[fol. 37] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF EXCEPTIONS OF KERR STEAMSHIP COMPANY, INC.—
Filed July 30, 1952

Sir: Please take notice, that respondent Kerr Steamship Company, Inc., excepts to the libel and complaint of Blazey Czaplicki as follows:

First. That as appears from said libel (Exhibit "A" annexed) and from the exceptive allegation hereunto at-

tached and by reference made ~~apart~~ hereof, the libelant is barred from commencing this action because of his laches.

Second. That as appears from the aforesaid exceptive allegations libelant is barred from commencing this action because he has elected and received a Formal Compensation Award (Exhibit "B" annexed) and benefits under title 33 [fol. 38] USC, 901 et seq., commonly known as the Longshoremen's and Harbor Worker's Compensation Act.

Please take further notice, that said exceptions and exceptive allegations will be brought on for hearing at a Stated Term of the within-named Court to be held for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York on the 19th day of August, 1952, at 10:00 A. M. in the forenoon of said day or as soon thereafter as counsel can be heard at which time a motion will be made for an order sustaining said exceptions and dismissing the libel herein.

Yours, etc., Haight, Deming, Gardner, Poor & Havens, Proctors for Respondent Kerr Steamship Company, Inc., 80 Broad Street, New York 4, N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 401 Broadway, New York 13, N. Y.

[fol. 39] IN UNITED STATES DISTRICT COURT

EXCEPTIVE ALLEGATIONS OF KERR STEAMSHIP COMPANY, INC.
—Filed July 30, 1952

First. That at all the times mentioned in the libel, Kerr Steamship Company, Inc., was and is a corporation existing under and by virtue of the laws of the State of Delaware with an office and place of business at 32 Pearl Street in the City, County and State of New York.

Second. That libelant has elected and received a Formal Compensation Award and benefits from the United States Compensation Commission under date of September 28, 1945, as signed by Louis Schwartz, Deputy Commissioner, and is therefore barred from pursuing this action under title 33 USC, 901 et seq., commonly known as the Longshoremen's and Harbor Workers' Compensation Act.

Third. That as appears from the libel herein this accident happened September 6, 1946. This present action was commenced on or about June 12, 1953. Because of the delay in commencing the within proceeding respondent has been prejudiced to its detriment in investigating the matter and libelant has therefore been guilty of laches.

[fol. 40] Wherefore, respondent Kerr Steamship Company, Inc., respectfully requests that the said libel may be dismissed together with costs and disbursements and that respondent have such other and further relief as to the Court may seem just and proper.

Haight, Denning, Gardner, Poor & Havens, Proctors
for Kerr Steamship Company, Inc., 80 Broad
Street, New York 4, N. Y.

[fol. 41] *Duly sworn to by William J. Gelling. Jurat Omitted in printing.*

[fols. 42-49]

EXHIBIT "A"

Libel omitted. Printed side page 21 ante.

[fol. 50]

EXHIBIT "B"

Copy

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
Second Compensation District

In the matter of the claim for compensation under the
Longshoremen's and Harbor Workers' Compensation Act.

BLAZEY CZAPLICKI, Claimant,

against

NORTHERN DOCK COMPANY, Employer,

TRAVELERS INSURANCE COMPANY, Insurance Carrier

Compensation Order Award of Compensation Case
No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

Findings of Fact:

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud" which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach the catwalk leading to a hatch, the steps gave way and he fell about five

[fols. 51] feet in consequence of which he sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to \$1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at \$22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to \$45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at \$22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of \$45.00, and shall continue payments thereafter in bi-weekly installments at \$22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 642 Washington Street,
New York City, this 28th day of September, 1945.
L. G. Schwartz, Deputy Commissioner, Second
Compensation District.

[fols. 52-53]

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the

employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Glazey Czaplicki, 259 4th Street, Jersey City, N. J.
Northern Dock Company, Pier 3, River Street, Hoboken,
N. J.

Travelers Insurance Company, 60 Park Place, Newark,
N. J.

Dennis O'Keefe, Claims Examiner.

Mailed September 28, 1945.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ANSWERING AFFIDAVIT OF BLAZEY CZAPLICKI BY LIBELANT ON
EXCEPTIONS TO LIBEL AND COMPLAINT BY RESPONDENT,
KERR STEAMSHIP COMPANY, INC.—Filed December 11,
1952

STATE OF NEW JERSEY,
County of Hudson, ss:

Blazey Czaplicki, being duly sworn, deposes and says:

I am the libelant in the above matter and reside at 259
4th Street, Jersey City, New Jersey.

On September 6, 1945 I was employed as a longshoreman
by Northern Dock at Pier 3, Hoboken, and was loading the
SS. Hoegh Silvercloud. During lunch hour the carpenter
had built steps which were to be fastened to the catwalk.
While walking over these steps they collapsed and I fell
and injured myself. The steps were not fastened or secured
by the carpenters and were carried away when I stepped
on it. The carpenters were not connected with my company,
but were working for separate carpenter company which
I am told is the Hamilton Marine Contracting Company.

I injured my left side, my left thigh, my left elbow, my right leg and my left testicle.

[fol. 55] I was treated by Dr. Londrigan for seven weeks. When he refused to treat me any more I then went to other doctors, Dr. Dodson of Jersey City, Dr. Halligan of Jersey City and Dr. Ralph Abels of Jersey City. As a result of my injuries in this accident Dr. Abels operated upon me at the Fairmount Hospital and removed my left testicle. This operation took place in August 1946. I have not been doing any work since February 1950.

A few weeks after I was injured, during the end of September, 1945, I went to the U. S. Compensation Commission to get compensation and I was told to sign a paper which I did, after which they paid me compensation for seven weeks at \$22.50 per week, or a total of \$160.72 and I never received any compensation or monies after that.

I did not receive any notice of any hearing, nor did I attend any hearing. I was not represented by an attorney. I do not know what was in this paper I signed, but I was told if I signed the paper I would get compensation and medical treatment.

At that time I did not know anything about what is meant by a third party action and I did not know that I could sue the carpenter people and I did what they told me to do.

I have since found out that the Travelers Insurance Co. were the insurance company for my employer, Northern Dock, and were also the insurance company for the carpenter people, Hamilton Marine Contracting Company, who were responsible for my accident. At the time when I signed this paper in compensation I was totally disabled and was unable to work and was still under treatment.

Later on I went to see lawyers, Hoberman & Hoberman, [fol. 56] of Jersey City, who filed a suit in my behalf in the Hudson County Court of Common Pleas on April 30, 1946, which suit was filed against Kerr Steamship Company. I am informed that the suit was dismissed on November 22, 1946 on motion, on the ground that this company was not properly served in New Jersey. I am informed that a New York attorney filed another suit in New York which he discontinued voluntarily without my consent. I do not know this lawyer, Paul Murphy, who I

am informed started the suit, nor do I know what happened.

I then engaged Joseph Hanrahan of Hoboken as my lawyer who engaged Nathan Baker and they have tried to get service of papers upon the owners of the ship and the ship. I am informed that they were unable to do so for a long period of time as the Norwegian Shipping and Trade Mission could not be found in the United States, nor could the ship, Hoegh Silvercloud, be found in the United States upon whom libel could be served.

There will be no prejudice to the Steamship Company because I can still get the witnesses who can show how the accident happened and I will be glad to give them the names and addresses of these witnesses. Furthermore, they knew about this accident and probably investigated it immediately after the happening of this accident. The first employers report filed in compensation describes the accident exactly as follows: "Mair was ascending steps to get over catwalk to No. 1 hatch. Steps were not fastened and they carried away." This report was filed by Northern Dock on September 6, 1945 with the Compensation Commission. Since the Travelers Insurance Company represented my employer, and also were the insurance company [fol. 57] for the carpenter company, Hamilton Marine Contracting Company, they have all the knowledge and information concerning the accident and I am sure have the names and addresses of witnesses and statements from witnesses.

Blazey Czaplicki

Sworn and subscribed to before me this 28th day of October, 1952. Gertrude Bremer, Notary Public of New Jersey.

[fol. 58]

[File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

REPLY AFFIDAVIT OF FRANCIS X. BYRN—Filed December 11,
1952STATE OF NEW YORK,
County of New York, ss.:

Francis X. Byrn, being duly sworn, deposes and says that he is an attorney associated with the proctors for the respondent Kerr Steamship Company, Inc., and is fully familiar with all proceedings had herein.

This affidavit is made in reply to libelant's memorandum of law and his answering affidavit verified the 28th day of October, 1952.

With respect to Mr. Czaplicki's affidavit, he alleges that, among other things, he injured his left testicle on September 6, 1945. In the findings of fact made by the Deputy Commissioner as part of the Formal Compensation Award there is not the slightest indication of such a serious and painful injury, nor will the compensation records which deponent has subpoenaed for this hearing bear out this contention.

[fol. 59] Mr. Czaplicki also alleges that he received no notice of hearing, nor was he represented by counsel, nor did he know what he was signing. That Mr. Czaplicki reads and understands English is manifest from his affidavit. The compensation records will also indicate that Mr. Czaplicki's rights were explained to him, that he made a definite decision to elect compensation after pondering the possibility of a third-party suit, and that he did not desire an attorney. He did not demand a hearing, as he must under Title 33 U.S.C. 919(c):

"The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim and upon application of any interested party shall order a hearing thereon." (Italics

The affidavit of Richard S. Lombard, verified the 30th day of October, 1952, shows abundant opportunity to proceed against the "Hoegh Silvercloud" in the United States. Kerr Steamship Company, Inc., has been in New York at all times since the accident and was indeed served in the Supreme Court action, as shown in respondent's memorandum of law. Furthermore, as the affidavit of service on Oivind Lorentzen shows, it was the Norwegian Consulate that was ultimately served in New York. If this be good service in June, 1952, it would certainly be good service prior thereto.

Respondent did not investigate this accident, as the injuries were apparently slight and libelant had indicated his willingness to receive a Formal Compensation Award.

With respect to libelant's memorandum of law, it is contended that the procedural requirements of Title 33 U.S.C. 919 have not been met. A perusal of the compensation [fol. 60] records shows that said requirements have been complied with:

1. Claim has been filed as required under 919(a).
2. It was not necessary to notify claimant (919(b)), as to the employer and carrier notice is presumed (Title 33 U.S.C. 920(b)).
3. The Deputy Commissioner investigated the case, as required under 919(c). (See Formal Compensation Award.) No party applied for a hearing, and it was thereby waived by all.
4. Section 919(e) says:

"The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each."

The document herein has as its caption alongside the title:

"Compensation Order"

"Award of Compensation"

It was also sent by registered mail on September 28, 1945, to all parties.

Concededly, under Section 919(c), the Deputy Commissioner did not wait twenty days after notice of claim was given to make the formal award; but said notice need not have been given under Section 919(b) to claimant, and neither the employer nor the carrier has ever contested this irregularity. The hearing is primarily for their benefit to contest the claim. Here Mr. Czaplicki obtained the more favorable of two results: His claim was not rejected. He *did* receive an award.

[fol. 61] Further, a similar irregularity with respect to the twenty-day period referred to in Section 919(c) has been held to be unimportant under a limitation that "is directory not mandatory or jurisdictional." *Maryland Casualty Co. v. Cardillo*, 99 F. (2d) 432 (C.C.A. Dist. Col., 1938). "The twenty-day provision in the last sentence of 919(c) we regard as neither mandatory nor jurisdictional." *Candado Stevedoring Corp. v. Willard*, 185 F. (2d) 232 (C.C.A. 2, 1950).

The reason for the speedy action on the part of the Deputy Commissioner is obvious. The carrier, hearing of the possibility of a third-party suit, withheld compensation. The Deputy Commissioner acted expeditiously in Mr. Czaplicki's interest to afford him the compensation he requested.

Libelant has attempted by indirection to circumvent the provisions of Title 33 U.S.C. 921(d):

"Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter."

Libelant also contends that laches may not be shown by exceptions and exceptive allegations. In so doing he has not cited a single case in this Circuit. This Circuit is committed to the propriety of such procedure. *The Sydfold*, 86 F. (2d) 611 (C.C.A. 2, 1936); *Hughes v. Roosevelt*, 107 F. (2d) 901

(C.C.A. 2, 1939). See, also, *Westfal-Larsen v. Allman-Hubble*, 73 F. (2d) 200 (C.C.A. 9, 1934).

Libelant relies heavily on *Gardner v. Panama R. Co.*, 342 U. S. 39. Plaintiff's diligence in that case was apparent, [fol. 62] especially in view of the relatively short one-year limitation.

If the question of laches is not disposed of on this motion or at a hearing called for that purpose, it will be more than ten years after the accident before this case is reached for trial.

As an added element of prejudice to respondent, your deponent has just learned by a telephone call with the Compensation Office that Deputy Commissioner Schwartz is deceased.

Wherefore, deponent respectfully prays for The relief requested in the moving papers herein.

Francis X. Byrn.

Sworn to before me this 30th day of October, 1952.
Margaret E. Obertz, Notary Public, State of New York. No. 41-2922800. Qualified in Queens County. Cert. filed with N. Y. Co. Clks. Cert. filed with Queens Co. Reg. Commission Expires March 30, 1953. (Seal.)

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF RICHARD S. LOMBARO—Filed December
11, 1952

STATE OF NEW YORK,
County of New York, ss:

Richard S. Lombard, being duly sworn, deposes and says that he is a clerk in the employ of Haight, Denning, Gardner, Peor & Havens, proctors for respondent Kerr Steamship Company, Inc. That he has inspected the issues of the New York Maritime Register for the years 1946, 1947 and

1948, and of Lloyd's Shipping Index Voyage Supplement for the years 1949, 1950 and 1951, and that the said publications report that the Norwegian motorship "Hoegh Silvercloud" was present in the following American ports on the dates given:

1945	New York	August 12—September 8
1946	New York	January 10—February 22
	Seattle	July 8—July 13
	Los Angeles	July 15—July 18
	San Francisco	July 20—July 24
[fol. 64]		
1947	Los Angeles	January 5—January 8
	San Francisco	January 9—January 18
	Seattle	February 9—February 9
	Los Angeles	February 15—February 17
	San Francisco	February 19—February 23
	Boston	September 8—September 10
	New York	September 11—September 15
	Baltimore	September 16—September 18
	New York	September 19—October 1
	Philadelphia	October 2—October 4
1948	New York	May 21—June 4
	Philadelphia	June 5—June 7
	Norfolk	June 8—June 9
	Seattle	November 24—November 26
1949	Tacoma	January (—)—January 9
	Portland (Ore.)	January 10—January 14
	Seattle	July (—)—July 12
	Los Angeles	July 15—July 16
	San Francisco	July 18—July 28
1950	Boston	March 29—March 30
	New York	March 31—April 7
	Philadelphia	April 8—April 8
	Hampton Roads	April 9—April 14
	Philadelphia	April 14—April 16
	New York	April 17—April 17
	Albany (N. Y.)	April 18—April 19
	New York	April (—)—April 22
1951	New York	April 28—May 6
	Hampton Roads	May 7—May 13
	New York	October 23—November 11
	Philadelphia	November 12—November 14
	Baltimore	November 14—November 17
	Hampton Roads	November 18—November 18
	Houston	November 23—November 29
	New Orleans	December 1—December 5
	New York	December 11—December 14

Richard S. Lombard.

Sworn to before me this 30th day of October, 1952.
Margaret E. Obertz, Notary Public, State of New
York. No. 41-2922800. Qualified in Queens County.

Cert. filed with N. Y. Co. Clks. Cert. filed with Queens Co. Reg. Commission expires March 30, 1953. (Seal of Margaret E. Obertz, Notary Public, State of New York.)

[fol. 65] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

BLAZEY CZAPLICKI, Libelant,

against

s/s HOEGH SILVERCLOUD, Her Boilers, Engines, Tackle,
Apparel and Furniture

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF
the Royal Norwegian Government, Doing Business Under
the Name and Style of The Norwegian Shipping and
Trade Mission, Kerr Steamship Company, Inc., and
Hamilton Marine Contracting Company, Inc., Respond-
ents

• MEMORANDUM—December 11, 1952

Nathan Baker, Esq., Proctor for Libelant, 404 Broadway,
New York 13, New York.

Haight, Demin, Gardner, Poor & Havens, Esqs., Proc-
tors for Respondent Kerr Steamship Company, Inc., 80
Broad Street, New York 4, New York.

Sidney Sugarman, U. S. D. J.

[fol. 66] SUGARMAN, D. J.:

On exceptions and exceptive allegations of respondent
Kerr Steamship Company to the libel of Blazej Czaplicki.

Libelant was injured on September 6, 1945 while going
aboard the S.S. Hoegh Silvercloud in the performance of
his duties as a longshoreman employed by the Northern
Dock Company.

He was advised (by letter dated September 25, 1945 from
D. B. O'Keeffe, Claims Examiner in the office of the Com-

pensation Commission) of his right to sue a third party and of the effect of acceptance of compensation under an award, namely, the assignment to his employer of any cause of action to recover damages from a third party.

Thereafter D. B. O'Keeffe incorporated in the Commission's file a report stating—

"The claimant called on September 27, 1945, and the provisions of Section 33(b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

He filed a Claim for Compensation and a formal order will be issued accordingly."

[fol. 67] Libelant's claim having been duly filed, a formal order and award was made in the proceeding by a Deputy Commissioner. Under this award, libelant received a total of \$160.72 at the rate of \$22.50 per week for disability ending December 25, 1945.

Notwithstanding, on April 30, 1946, ~~his~~ libelant commenced a third party suit against respondent Kerr Steamship Company, Inc., in New Jersey in the Hudson County Court of Common Pleas to recover damages for his injuries. This suit was dismissed on November 22, 1946 for improper service of process on Kerr Steamship Company. A second suit to recover for libelant's injuries was then commenced and later voluntarily discontinued.¹

By October 4, 1948, libelant had retained his present counsel, but the libel herein was not filed until June 12, 1952.

The exceptions and exceptive allegations of respondent Kerr Steamship Company, Inc., were brought on to be heard on the grounds (1) libelant is barred from com- [fol. 68] mencing this action because he has elected to receive and did receive compensation under an award in

¹ Respondent's brief alleges this suit was commenced in Supreme Court, New York County, and was discontinued November 26, 1947. Libelant asserts it was both commenced and discontinued without his consent.

a compensation order filed by the Deputy Commissioner, and (2) libelant is barred from commencing this action because of laches.

Libelant meets the first exception with the challenge that the Deputy Commissioner's award, made without a hearing, constituted no more than a memorandum and is not "an award in a compensation order filed by the deputy commissioner", the acceptance of compensation under which operated as an assignment of his claim to his employer.²

I disagree. Under the procedure in respect of claims set up by the statute,³ if no hearing is demanded by an interested party the Deputy Commissioner need not order one and may proceed to an order either rejecting the claim or making an award.

Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keeffe's categorical statement of what transpired on September 27, 1945 docketed in the Commission's file the next day, I cannot accept libelant's statement (in his answering affidavit of October 28, 1952) more than seven years later that he didn't understand what O'Keeffe told him, as a basis for upsetting the finality of the Deputy Commissioner's award.

Accordingly the exception and exceptive allegation that libelant is barred for having "elected and received a Formal Compensation Award and benefits under Title 33 U.S.C. 901 et seq." is sustained.

No consideration is given the exception based on laches. Libel dismissed.

Dated: December 11, 1952

New York, New York.

Sidney Sugarman, United States District Judge.

² 33 U.S.C.A. 933b.

³ 33 U.S.C.A. 919(c).

[fol. 70]

[File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

BLAZEY CZAPLICKI, Libelant,

against

~~S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel
and furniture,~~

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR
of the Royal Norwegian Government, doing business
under the name and style of The Norwegian Shipping and
Trade Mission, Kerr Steamship Company, Inc., and Ham-
ilton Marine Contracting Company, Inc., Respondents.

A 173-113

ORDER AND FINAL DECREE—December 29, 1952

Respondent Kerr Steamship Company, Inc., having made
a motion for an order sustaining its exceptions to the libel
herein on the grounds (1) that libelant is an improper
party, libelant having accepted compensation under a
formal compensation award issued under Title 33 U.S.C.
933(b), and (2) libelant's laches, and the said motion
having duly come on to be heard before the Honorable
Sidney Sugarman on the 30th day of October, 1952, and
Haight, Deming, Gardner, Poor & Havens, by Francis X.
Byrn, Esq., of counsel, having appeared in support of said
motion, and Nathan Baker, by Bernard Chazen, Esq., of
counsel, having appeared in opposition thereto, and having
been argued and submitted, and the Court, after due de-
liberation, having rendered its decision contained in a
written memorandum opinion sustaining respondent Kerr
Steamship Company, Inc.'s exceptions to the libel on the
first ground above, and for that reason not considering
[fol. 71] the exceptions based upon the questions of laches:

Now, on motion of Haight, Deming, Gardner, Poor &

Havens, proctors for respondent Kerr Steamship Company, Inc., it is

• Ordered that respondent Kerr Steamship Company, Inc.'s exceptions to the libel based upon the existence of a formal compensation award within the meaning of Title 33 U.S.C. 933 (b), be and the same are in all respects sustained, and it is further.

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed as to respondent Kerr Steamship Company, Inc.

Sidney Sugarman, U. S. D. J.

At New York, N. Y., in said District, this 29th day of December, 1952.

[fol. 72] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 73] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY LIBELANT—Filed Jan. 16, 1953

SIRS: Please take notice that the libelant in the above entitled cause hereby appeals to the United States Court of Appeals for the Second Circuit, from the order entered herein on the 30th day of December 1952, dismissing the libel as to the respondent, Kerr Steamship Company, Inc.

Dated: New York, N. Y.
January 13, 1953

Nathan Baker, Proctor for libelant. Office & P. O.
Address: 1 Newark St., Hoboken, N. J., and 401
Broadway, New York.

To: Haight, Deming, Gardner, Poor & Havens, Esqs.,
Proctors for respondent, Kerr Steamship Co., Inc., 80 Broad

St., New York; Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York; Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondent, Oivind Lorentzen, etc., 80 Broad St., New York.

[fol. 74]

[File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

0

[Title omitted]

NOTICE OF MOTION TO DISMISS, ETC.—Filed November 2, 1953

Sirs:

Please take notice that upon the annexed affidavit of Nathan Baker, proctor for libelant, verified on the 30th day of October, 1953, I shall move this court at a stated term thereof for the hearing of motions to be held in Room 506 on the 5th day of November, 1953, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order,

1. Dismissing the *the* Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.

2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.

3. To make the said Travelers Insurance Company a party to the said action.

4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

[fol. 75] 5. For any other order which the court may deem just.

The libelant will rely upon the pleadings and the depositions filed in this action and upon the affidavit of libelant previously filed herein, and upon the affidavit of Nathan

Baker, Esq., which is attached hereto and made a part hereof.

Dated: October 30, 1953, New York, N.Y.

Nathan Baker, Proctor for libelant, Office & P.O. Address, 1 Newark St., Hoboken, N. J. and 401 Broadway (Room 2201), New York City.

To: Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondents, Oivind Lorentzen, etc., Kerr Steamship Company, Inc., 80 Broad St., New York City, N.Y. Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York City. Travelers Insurance Company, 80 John St., New York City.

[fol. 76] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, ETC.—Filed November 2, 1953

STATE OF NEW JERSEY,
County of Hudson, ss.:

Nathan Baker, being duly sworn according to law deposes and says:

I am the proctor for libelant in the above entitled action. Libelant alleges that on September 6, 1945 he was employed as a longshoreman by Northern Dock and Pier 3, Hoboken, and was loading the SS Hoegh Silvercloud. During lunch hour the carpenter had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on it. The carpenters were not connected with his company, but were working for separate carpenter company which he was told is the Hamilton Marine Contracting Company.

[fol. 77] Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the carpenters.

From the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945 a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties.

The Travelers Insurance Company is also the insurer for respondent, Hamilton Marine Contracting Co., one of the third parties involved in this case and consequently will be liable for all or part of any recovery obtained by libelant in this action.

On December 30, 1952 the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U.S.C. 933(b). A copy of the said decree is attached hereto and made a part hereof. An appeal from said decree is now pending.

The other respondents, SS Hoegh Silvercloud, Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

The said cause of action, under the ruling of Judge Sugarman, was assigned and is controlled by the Travelers Insurance Company which was the insurance carrier for the Northern Dock Co., the employer of the libelant.

[fol. 78] Section 33(b) of the Longshoremen & Harbor Workers Compensation Act by its assignment provision as construed by Judge Sugarman made the said Travelers Insurance Company the trustee of the cause of action in which libelant and the said Travelers Insurance Company had an interest.

The Travelers Insurance Company, as assignee of the cause of action of libelant, under Judge Sugarman's deci-

sion, failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant.

Because of the conflict of interest of the trustee in this action, the libelant must appeal to the traditional powers of the court to protect his right and to do justice.

For these reasons application is made to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. and cannot take advantage of their own default in failing to sue as trustee of the cause of action.

Furthermore, libelant makes this application to the court to make the Travelers Insurance Co. a party to this action to compel Travelers Insurance Co. to sue in its behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or requiring Travelers Insurance Co. to reassign said cause of action to the libelant because of conflict of interests, and to do justice to the libelant herein.

Nathan Baker.

Sworn and subscribed to before me this 30th day of October, 1953, Gertrude Brewer, Notary Public of New Jersey. My commission expires Dec. 14, 1954.

[fols. 79-82] MEMORANDUM OPINION Omitted—Printed side page 65 ante

[fol. 83]

[File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ZEY CZAPLICKI, Libelant,

against

S/S HOEGH SILVERCLOUD, Her Boilers, Engines, Tackle, Apparel and Furniture and Against Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents.

OPINION—Nov. 30, 1953

GODDARD, District Judge:

This is a motion by libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign [fol. 84] the cause of action for injuries suffered by libelant, to libelant.

Libelant filed this suit on June 12, 1952 to recover for injuries allegedly suffered by him, as a longshoreman employed by Northern Dock Company, while loading the S/S Hoegh Silvercloud on September 6, 1945. Libelant alleges that Hamilton negligently failed to fasten a catwalk they constructed and that it collapsed while he was on it, thereby causing his injury.

In July, 1952, one of the respondents, Kerr Steamship Company, excepted to the libel on the ground that libelant had elected to, and did, receive a compensation award under the Longshoremen's and Harborworkers' Compensation Act [33 U.S.C.A. § 901-50]. Judge Sugarman, of this district, found that libelant had made such an election and received a compensation award, and any cause of action against a third party was thereby assigned to his employer.

The libel was dismissed as to Kerr on December 11, 1952. An appeal from this decision is pending.

Hamilton, in its answer, denies any negligence, alleges contributory negligence and laches and its fifth defense asserts that by virtue of libelant's election, the cause of action was assigned to his employer, Northern, and/or its insurance carrier, Travelers.

[fol. 85] Libelant asserts that Travelers is the insurance carrier for both northern and Hamilton and says that Travelers "has failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant." Libelant thus seems to assume that he may sue, or require Travelers to sue.

Title 33 U.S.C.A. § 933, provides:

"Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, * * *, to receive such compensation or to recover damages against such third person."

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.*

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the

result of a compromise, shall be distributed as follows:

[fol. 86] (1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise * * *

(B) the cost of all benefits actually furnished by him to the employee under Section 907;

(C) all amounts paid as compensation;

(D) * * *

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." [emphasis added]

In *Hunt v. Bank Line*, 35 F. (2nd) 136, C.C.A. 4, 1929 the court passed on this very question. The libelant there argued that where, after the assignment of the cause of action to his employer, it refused to sue the third party because its insurance carrier was also the carrier for the vessel, the employee could bring suit, joining his employer as a party. The court held to the contrary, on the ground that the statute did not allow it. The court stated at 138:

It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. [fol. 87] Then, and not until then, the interest of such employee arises. And this is given by the statute, not, we think, because he is deemed to have any

interest in the cause of action, but to avoid the unsightly spectacle of the employer realizing a profit from his injury." [emphasis added]

In *Johnson v. American-Hawaiian SS Co.*, 98 F. (2nd) 847, C.C.A. 9, 1938, at 850, the court declared:

"We think that a sound construction of the act warrants the conclusion that once the employee has made a valid binding election to accept compensation he has no further control over the cause of action against the third person whose negligence caused the injury." Accord, *The Nako Maru*, 101 F. (2nd) 716, C.C.A. 3, 1939, at 717; *Moore v. Hechinger*, 127 F. (2d) 746, C.A.D.C. 1942, at 748.

The Act gives the employee the right to elect between compensation from his employer and a suit against the third party. But he cannot have both. *Moore v. Hechinger*, supra, at 748; *Fontana v. Beuna R. Co.*, 106 F. Supp. 461, 463.

Having made his election to receive the compensation award, the libellant has no further rights against Hamilton. *Currant v. Eastern SS Lines*, 77 F. Supp. 9, affirmed on the opinion of the district court, 170 F. (2nd) 148, C.C.A. 1, 1948.

However, if Northern, or its insurance carrier, Travelers, had brought suit against Hamilton and recovered an amount in excess of the compensation paid, plus expenses incurred in the suit, Northern, or its insurance carrier, would hold such excess as trustee for the libellant. [fol. 88] It follows that the motion to strike the defense must be denied.

It also follows that libellant's attempt to require Travelers to bring suit must be denied. Under the Act, by the express election of libellant, all rights were assigned to the carrier here. By the specific terms of the Act, the carrier is given control of the litigation, upon assignment. *Calif. Casualty Indemnity Exchange v. United States*, 74 F. Supp. 410; *The Aden Maru*, 51 F. (2nd) 599, 600. It is the carrier's right to compromise the employee's claim against third parties as it sees fit. *The Etna*, 138 F. (2nd) 37, C.C.A. 3, 1943, at 40.

The employee is entitled to claim compensation although the accident was due partly or entirely to his own negligence. It is plain that, since the carrier's liability to pay compensation is absolute whereas the possible liability of a third party is grounded on proof of its negligence, there will be many occasions where the carrier may not be able to recover over against the third party. cf. *Lorraine v. Coastwise Lines*, 86 F. Supp. 336, 339. The Act clearly gives the carrier the freedom, in the absence of fraud, to weigh its chances of recovery and to make its choice to sue or not, accordingly. "The authority on the part of the employer to compromise without instituting suit negatives any right on the part of the employee to have suit instituted. And it is to be noted, also, that the employee is given no power to control or veto the compromise." *Hunt v. Bank* [fol. 89] *Line*, supra, at 137.

In *Moore v. Hechinger*, supra, the court in holding that an employee was not a proper party plaintiff in a suit against a third party by the insurance carrier, stated at p. 749:

"Furthermore, reason compels this conclusion, for if the employee is a necessary or proper party, the freedom of action which the statute vests in the employer in the circumstances we are considering would be lost. He could neither dismiss, settle, nor prosecute over the objection of his co-plaintiffs. His hands would be tied, and the thing which the statute gives him absolutely would be subject to the control of another. Such a result the language of the statute does not warrant."

This reasoning is applicable here. To allow a libelant to step in again, after he has deliberately made his election to accept the award, and to require that suit be brought, would contravene the intent of the statute. To require a carrier to institute suit where in its judgment there may be little or no chance for recovery would be oppressive, and contrary to the Act.

Were there a showing of fraud, the result might be different. cf. *The Kokusai Kisen Kabushiki Kaisha*, 44 F. (2d) 659; *United States Fidelity & Guaranty Co. v. United States*, 152 F. (2d) 46, C.C.A. 2, 1945, at 48; *Currant v. East*

SS Lines, supra. The libelant does not charge fraud. In fact his charges fall far short of the usual requirements for pleading fraud, cf. Rule 9(b) F.R.C.P.

[fol. 90] The New York cases, under the New York Workmen's Compensation Law, a similar statute, have also held that the statutory assignment is absolute, in the absence of fraud, cf. *Skakandy v. New York*, 274 App. Div. 153, affirmed 298 N.Y. 886; *Taylor v. New York Central RR*, 294 N.Y. 397, 402; *Monti v. Gimbel Bros.*, 192 Misc. 811; affirmed 275 App. Div. 845.

Motion denied. Settle order on notice.
November 30th, 1953.

Henry W. Goddard, U.S.D.J.

[fol. 91]

[Title omitted]

IN UNITED STATES DISTRICT COURT

NOTICE OF SETTLEMENT OF ORDER—Filed Dec. 14, 1953.

Sirs:

Please take notice that an order of which the within is a copy will be presented for settlement and signature to Hon. Henry W. Goddard, Judge, of the United States District Court at the office of the Clerk of this court at the Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 11th day of December, 1953, at 11:00 o'clock in the forenoon of that day.

Dated, New York, N. Y. December 4, 1953.

Yours, etc. Galli & Locker, Proctors for Respondent,
Hamilton Marine Contracting Co., Inc. Office & P. O.
Address: 80 John Street, New York 38, New York.

To: Nathan Baker, Esq., Proctor for Libelant. Office &
P. O. Address: 401 Broadway (Room 2201), New York,
N. Y.

To: Haight, Deming, Gardner, Poor & Havens, Esqs.,
Proctors for respondents, Oivind Lorentzen, etc. and Kerr
Steamship Co., Inc., 80 Broad Street, New York, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER DENYING MOTION TO DISMISS, ETC.—Filed Dec. 14, 1953

A motion by the libelant, Blazey Czaplicki, for an order:

1. Dismissing the Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.

2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.

3. To make the said Travelers Insurance Company a party to the said action.

4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

5. For any other order which the court may deem just.

having duly come on for hearing before this court on November 5, 1953, and upon reading and filing the said notice of motion dated October 30, 1953 and the affidavit of Nathan Baker verified October 30, 1953 together with a copy of the memorandum of Sidney Sugarman, United States District Judge, attached thereto and the affidavit of Bernard J. McGlinn verified the 4th day of November, [fol. 93] 1953, and after hearing Nathan Baker, proctor for the libelant, in support of said motion and Galli & Locker, by Bernard J. McGlinn, proctors for respondent Hamilton Marine Contracting Company, Inc., in opposition thereto and due deliberation having been had and upon filing the opinion of the court dated November 30, 1953, it is

Ordered that the said motion is in all respects denied.

Henry W. Goddard, U. S. D. J.

[fol. 95]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF BERNARD J. MCGLINN IN OPPOSITION TO MOTION
TO STRIKE—NOV. 4, 1953

STATE OF NEW YORK

County of New York, ss:

Bernard J. McGlinn, being duly sworn, says:

I am an attorney in the office of Galli & Locker, proctors for Hamilton Marine Contracting Company, Inc., one of the respondents herein. As such, I am familiar with the facts in this case and make this affidavit in opposition to the libelant's motion for an order dismissing the Fifth Separate Defense contained in the answer of the respondent, Hamilton Marine Contracting Company, Inc.

The libelant was an employee of Northern Dock Company, Inc. On September 6, 1945, he was injured in the course of his employment. He elected to take compensation under the Longshoremen's and Harbor Workers' Compensation Act. On September 28, 1945, the Deputy Commissioner in the Second Compensation District made an award and order directing the payment of compensation [fol. 96] to the libelant in accordance with the Longshoremen's and Harbor Workers' Compensation Act. The said compensation was duly paid to the libelant by The Travelers Insurance Company, the insurance carrier for the Northern Dock Company, Inc. The payment by The Travelers Insurance Company to the libelant of the said compensation pursuant to the order of the Deputy Commissioner dated September 28, 1945 under the Longshoremen's and Harbor Workers' Compensation Act operated as an assignment of the libelant's claim to recover damages against any third party. Thereafter, the libelant brought this action against the ship, SS Hoegh Silvercloud, and against the three respondents. The respondent, Hamilton Marine Contracting Company, Inc., in its answer to the

libel pleaded as a Fifth Separate Defense thereto (Twenty-third to Twenty-ninth) the facts above set forth to the effect that the libelant's accepting workmen's compensation pursuant to an award and by so doing his cause of action was automatically assigned to his employer, Northern Dock Company, Inc., or its compensation carrier, The Travelers Insurance Company.

It is this Fifth Defense which libelant now seeks to strike out in the answer of the respondent, Hamilton Marine Contracting Company, Inc.

On December 29, 1952, District Judge Sugarman dismissed the libelant's libel as to the respondent, Kerr Steamship Company, Inc. The basis of Judge Sugarman's decision was that the libelant had accepted compensation payments under the Longshoremen's and Harbor Workers' Compensation Act and that by accepting such compensation payments pursuant to an award the libelant's cause of action was assigned to his employer or his employer's insurance carrier. The defense pleaded is good. By accepting workmen's compensation under [fol. 97] the Longshoremen's and Harbor Workers' Compensation Act, the libelant lost any cause of action he had against the third party. Libelant's motion to dismiss the Fifth Cause of Action and to add The Travelers Insurance Company as a trustee for libelant should be denied.

On this motion I also appear for The Travelers Insurance Company. The Travelers Insurance Company does not consent to be made a party to this litigation.

Wherefore, I respectfully request that the libelant's motion be denied in its entirety.

Sworn to before me this 4 day of November, 1953.

Bernard J. McGlinn.

[fol. 98]

[File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

EXCEPTIONS OF LORENTZEN—Filed December 23, 1953

Sirs:

Please take notice that respondent Oivind Lorentzen, Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, excepts to the libel and complaint of Blazey Czaplicki on the grounds that said Blazey Czaplicki is an improper party libellant, as has already been held in this case as to Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, #20212, by Judge Sidney Sugarman, Exhibit A annexed, and as given effect in an order dated December 29, 1952, by the Honorable Sidney Sugarman, Exhibit B annexed.

Please take further notice that said exceptions will be brought on for a hearing in a Stated Term of the within-named Court, to be held for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 17th day of January, 1954, at ten o'clock in the forenoon of said day, or as [fol. 99] soon thereafter as counsel may be heard, at which time the motion will be made for an order sustaining said exceptions and dismissing the libel herein as to Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission.

Dated, New York, N. Y., December 22, 1953.

Yours, etc., Haight, Deming, Gardner, Poor &
Havens, Proctors for Oivind Lorentzen, as Director
of Shipping, etc., 80 Broad Street, New York 4,
N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 1 Newark Street, Hoboken, N. J.; Galli & Locker, Esqs., Proctors for Respondent, Hamilton Marine Contracting Company, Inc., 80 John Street, New York 38, N. Y.

[fols. 100-104] EXHIBIT "A"—Memorandum Opinion omitted. Printed side page 65 ante

[fols. 105-106] EXHIBIT "B"—ORDER AND FINAL DECREE—December 29, 1952—Omitted. Printed side page 70 ante

[fol. 107] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 108] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BLAZEY CZAPLICKI, Libelant,
against

S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel, etc., and
against

OLVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

FINAL DECREE—May 10, 1954

This cause having duly come on to be heard on the 20th day of April, 1954, before the Honorable Sylvester J. Ryan,

upon the pleadings and proofs, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having heretofore filed exceptions to the libel and complaint on the grounds that said Blazey Czaplicki, is an improper party libelant, as has already been held in this case as to respondent, Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, No. 20212, by the Honorable Sidney Sugarman, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having moved the Court on its exceptions, and respondent Hamilton [fol. 109] Marine Contracting Company, Inc., having by answer raised the defense that Blazey Czaplicki is an improper party libelant, relying as well on the afore-mentioned opinion and decision of the Honorable Sidney Sugarman, and having moved to dismiss the libel and complaint on these grounds, and this matter having been argued and submitted by the proctors for the respective parties, and the Court, after due deliberation having rendered its decision in open court, directing a decree dismissing the libel herein, with prejudice and without costs.

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with prejudice and without costs as to respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc., on the authority of the opinion and decision of Judge Sugarman, No. 20212, filed December 11, 1952, holding that Blazey Czaplicki was an improper party libelant, having accepted compensation under a formal award and order filed by the Deputy Commissioner within the meaning of Title 23, U.S.C., Sec. 933(b).

Dated at New York, N. Y., in said District this 10th day of May, 1954.

Sylvester J. Ryan, U.S.D.J.

[fol. 111] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 112] The attached decree was this day found in the folder of the case in Room 507 by William Maiers, a clerk in the office of Haight Deming Gardner Poor & Havens, Proctors for respondent. Said decree did not bear the file mark of the Court, nor had it been docketed in the case. Mr. Maiers called my attention to this paper. I have this day placed the file mark of the Court upon it.

Robert Follmer, Admiralty Docket Clerk.

6/24/54.

[fol. 113] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

NOTICE OF APPEAL—Filed July 16, 1954

Sirs:

Please take notice that the Libelant in the above entitled cause hereby appeals to the United States Court of Appeals for the Second Circuit, from the final order and decree dated May 10, 1954 and filed June 24, 1954 dismissing the libel as to the respondent Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc. and from each and every part of the said order and decree.

Dated: New York, N.Y. July 15, 1954.

Nathan Baker, Proctor for libelant. Office & P.O.
Address, 1 Newark St., Hoboken, N. J. and 220
Broadway, New York City.

To: Galli & Locker, Esqs., Proctors for respondent,
Hamilton Marine Contracting Co., 80 John St., New York.
Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors
for respondent, Oivind Lorentzen, 80 Broad St., New York.

[fol. 114] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

CROSS-ASSIGNMENTS OF ERROR OF KERR STEAMSHIP COMPANY,
INC., ET AL.—Filed July 20, 1954

The respondents, Kerr Steamship Company, Inc., and Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government doing business under the name and style of The Norwegian Shipping & Trade Mission, hereby assign error in the proceedings, decrees, orders, and decisions of the District courts made by Judge Sidney Sugarman and Judge Sylvester J. Ryan as follows:

First: The District Courts erred in failing to dismiss the libel on the grounds of libelants laches in addition to the grounds upon which it was dismissed, to-wit, that libelant had elected and received compensation under a formal award pursuant to an order filed with the Deputy Commissioner under Section 33 U.S.C. 933 subdivision (b).

[fol. 115] Second: The District Courts erred by not holding that this action should be dismissed on the grounds that libelant did not pursue the remedies prescribed for rev of compensation orders by proceeding against the Commissioner within 30 days after filing of such order as prescribed in Section 33 U.S.C. 921 (a) and (b).

Dated New York, N. Y., July 19, 1954.

Haight, Deming, Gardner, Poor & Havens, Proctors
for Respondents Kerr Steamship Company, Inc.
and Oivind Lorentzen, etc., 80 Broad Street, New
York 4, N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 1 Newark Street, Hoboken, N. J. Galli & Locker, Esqs., Proctors for Respondent Hamilton Marine Contracting Company, Inc., 80 John Street, New York 38, N. Y.

[fol. 116] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 117] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1954

No. 278

BLAZEY CZAPLICKI, Libelant-Appellant,

v.

The Vessel "SS HOEGH SILVERCLOUD" Her Boilers, Engines, Tackle, Apparel and Furniture, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business Under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

OPINION—May 23, 1955

Before Clark, Chief Judge, and Frank and Hastie, Circuit Judges

Appeals from the United States District Court for the Southern District of New York, Judges Sugarman, Goddard and Ryan, presiding.

Libelant Czaplicki appeals from the dismissal of libels against Kerr Steamship Company, Inc., and SS. Hoegh Silvercloud and Oivind Lorentzen, and from the denial of a motion to make the Travelers Insurance Company a party to the action and to compel the Travelers Insurance Company to sue, in its own behalf and as trustee for libelant,

for injuries sustained by libelant when employed as a longshoreman loading the SS Hoegh Silvercloud. The libel was [fol. 118] dismissed, and the motion to make the Travelers Insurance Company a party was denied, because Czaplicki had previously accepted compensation under the Longshoremen & Harbor Workers Act, 33 U. S. C. Section 933(b). Affirmed.

Nathan Baker (Proctor for libelant, Baker, Garber & Chazen, of counsel); Bernard Chazen on the brief. Galli & Locker (Patrick E. Gibbons, of counsel), proctors for respondent.

The libelant is a longshoreman formerly in the employ of the Northern Dock Company. While loading the SS Hoegh Silvercloud at a Hoboken pier, he was injured by the collapse of steps built by carpenters in the employ of the Hamilton Marine Contracting Company. Both the Northern Dock Company and the Hamilton Marine Contracting Company were insured against liability by the Travelers Insurance Company.

Three months after the accident, the libelant visited the offices of the Travelers Company and several days later the offices of the United States Employees Compensation Commission, and discussed with them the methods available to him to receive compensation for his injury. At the office of the Compensation Commission he was explained the applicable sections of the Longshoremen's and Harbor Workers Act, 33 U. S. C. 901 et seq., which provides that a longshoreman may file a claim for compensation for injuries with the Commission (Sec. 919, that the deputy commissioner shall reject the claim or award compensation in respect of it (Sec. [fol. 119] 919(e), that acceptance of award of compensation shall operate as an assignment to the employer of all rights to recover damages against any third person responsible for the injury, Sec. 933(b); that the employer may either institute proceedings against the third person or compromise without formal proceedings, Sec. 933(d), that the amount recovered from the third person shall be retained by the employer up to the amount paid out under the award of compensation, and any excess paid to the injured party, Sec. 933(e), and that if the employer is insured and the in-

insurance company has paid the award of compensation, the insurance company shall be subrogated to all of the employer's rights under the statute; Sec. 933(i).

Czaplicki stated that he wished to receive the statutory award of compensation. A formal award of \$16,072 was then made, and this amount was paid to him by the Travelers Insurance Company, insurers of Czaplicki's employer, to whose rights they were subrogated. The Insurance Company never brought suit against the third person, the Hamilton Marine Contracting Company, for whom they were also insurers.

Seven years later, in 1952, the libellant instituted the present action against the Hamilton Company, the vessel, and Oivand Lorentzen and the Kerr Steamship Company, Inc., owners and operators of the vessel. The Kerr Company excepted, partially on the grounds that libellant, by accepting the award of compensation, had waived his rights in the matter and was no longer a proper party to bring suit. [fol. 120] Judge Sugarman dismissed the libel as to the Kerr Company on those grounds. Libellant then moved to strike one of Hamilton's defenses—that by virtue of his election he was no longer a proper party to bring suit—and further moved to add the Travelers Insurance Company as a party-plaintiff or to order Travelers to assign its cause of action in the matter to the libellant. Judge Goddard denied the motion in all respects on the grounds that, in the absence of fraud, the assignment was absolute. Judge Ryan then held a hearing and dismissed the libel as to the other parties on the authority of Judge Sugarman's earlier decision. Libellant has appealed.

FRANK, Circuit Judge:

1. When an injured party elects to receive an award of compensation under the terms of the Longshoremen's and Harbor-Workers' Compensation Act, the election operates as an assignment to his employer or his employer's insurer, of his right of action against third persons who may have caused the injury: *Hunt v. Bank Line*, 35 F. (2d) 136 (C. A. 4). The injured party is not without a financial interest in subsequent proceedings, however, for if the assignee recovers from the third person any amount in excess

of the award of compensation, that excess goes to the injured party. Libellant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand, written in respect of the statute as to compromises [fol. 121] between assignee and tortfeasor: ". . . although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest." *United States Fidelity & Guaranty Co. v. United States*, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party.

We do not, however, need to decide this issue; for, on account of his laches, libellant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libellant resides and where the accident occurred, or the statute of limitations of New York, where suit was brought, is our guide; the time has long since passed when the assignee might have recovered against the alleged tortfeasor.

2. Libellant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceedings. But the statute allows direct judicial review of an award, 33 U. S. C. § 921, and that section provides the exclusive method of securing judicial relief. Even assuming, however, that [fol. 122] an award may be thus collaterally attacked, libellant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on

the claim or make an award without a hearing after twenty days has expired since service on the employer of notice of the claim. 33 U. S. C. § 919. In the instant case, there was no hearing nor was a hearing requested. Admittedly, the deputy commissioner did not wait until twenty days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim.

Affirmed.

[fols. 123-125] UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BLAZEY CZAPLICKI, Libellant-Appellant

v.

s/s HOEGH-SILVERCLOUD, etc., Respondent,

OLIVAND LORENTZEN, as Director, etc., et al., Respondents-
Appellees

JUDGMENT—May 23, 1955

Appeal from the United States District Court for the
Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

(S.) A. Daniel Fusaro, Clerk.

[fol. 126] UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING--Filed June 7, 1955

To the Chief Judge and the Circuit Judges of the United
States Court of Appeals for the Second Circuit.

The petition of Blazey Czaplicki, respectfully shows:

Summary Statement of Matter Involved

This petition is submitted pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Second Circuit for a rehearing of the appeals in this action which were argued on April 13, 1955 before Chief Judge Clark [fol. 127] and Circuit Judge Frank and Circuit Judge Hastie. The opinion of this Court was rendered on May 23, 1955 and was written by Circuit Judge Frank. The opinion of this Court was based upon a finding of laches. A copy of Circuit Judge Frank's opinion appears in the appendix herein. This issue was not decided by the courts below and petitioner wishes to argue that in view of the opinion of the court the action should be reversed and remanded for further proceedings on the issue of laches. In addition, there are some minor errors of fact in the preamble to the opinion which should be corrected in the interest of accuracy.

Point I

The appeal has been decided on an issue as to which libelant has not had his day in court.

The court below made no findings on the issue of laches either as to inexcusable delay or as to prejudice to the respondents. In *Taylor v. Crain*, 195 F. 2d 163 (3 Cir. 1952) a label was filed over five years after the accident. The District Court dismissed without a hearing. In reversing and remanding, Judge Goodrich stated at page 165:

"* * * The libelant is entitled to an opportunity to prove what he alleges in his excuse for delay.

Libelant offered to amend his libel to allege that no

prejudice resulted against respondent from the delay. The district judge felt this necessary in view of our statement in the Kane case, that 'Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the respondent from such delay' (189 F. 2d 305). The amendment should be allowed as it was in *Redman v. United States*, 2 Cir., 1949, 176 F. 2d 713; *Hughes v. Roosevelt*, 2 Cir., 1939, [fol. 128] 107 F. 2d 901 and *The Sydfold*, 2 Cir., 1936, 86 F. 2d 611."

The Supreme Court in *Gardner v. Panama R. Co.*, 342 U. S. 29, 72 S. St. 12, 96 L. Ed. 31 (1951) in a *per curiam* opinion stated at page 30:

"Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * *"

Judge Sugarman decided the exceptive allegations of respondent Kerr Steamship Company solely on the ground that libelant's cause of action had been assigned. See page 1a et seq. of the appendix to libelant's original brief on this appeal.) Judge Sugarman specifically stated (p. 3a):

"No consideration is given the exception based on laches."

Judge Goddard in deciding on petitioner's motion to strike the defense of statutory assignment in the answer filed by Hamilton Marine Contracting Co., Inc. and to add Travelers Insurance Company as a party or to order Travelers Insurance Company to assign the cause of action back to libelant, did not deal with the issue of laches. (See page 6a et seq. of the appendix to libelant's original brief.)

Judge Ryan on hearing the balance of the case decided it solely on the ground that the law of the case had been

settled by the opinions of his brother judges. (See page 28a of the appendix to libelant's original brief.)

[fol. 129] Petitioner should be given an opportunity to prove the facts which would negative laches. If amendments to pleadings are required he should be given an opportunity to amend them. Furthermore, as to the parties insured by the Travelers Insurance Company, they should not be permitted to benefit by the failure of the Travelers Insurance Company to sue on libelant's cause of action.

Point II

There are errors in the preliminary statement to the court's opinion.

(a) the preliminary statement states that libelant visited the offices of Travelers Company and the United States Employees Compensation Commission "three months after the accident." The accident happened on September 6, 1945. The award by the Deputy Commissioner was dated September 28, 1945 (Lib. Exh. 2). He had talked to the representatives of the Travelers Insurance Company prior to that date. Therefore the interval was three "weeks" at most rather than three "months."

(b) The preliminary statement states that libelant was given a formal award of \$16,072. The award provided (Lib. Exh. 2):

"* * * ; 2 weeks at \$22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of \$45.00, and shall continue payments thereafter in bi-weekly installments at \$22.50 per week until disability shall have ceased or otherwise ordered."

He actually received a total of \$160.72 and not \$16,072 as stated in the preliminary statement.

[fol. 130]

Conclusion

Petitioner requests that the case be reversed and remanded so that he may have his day in court on the issue of laches.

Respectfully submitted, Nathan Baker, Proctor for Libelant-Appellant.

Baker, Garber & Chazen, of Counsel; Bernard Chazen, on the Petition.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

Nathan Baker.

[fol. 131]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

PER CURIAM ORDER DENYING REHEARING—June 14, 1955

Before Clark, Chief Judge, and Frank and Hastie, Circuit Judges.

On Petition for Rehearing.

Nathan Baker, Hoboken, N. J. (Baker, Garber & Chazen and Bernard Chazen, Hoboken, N. J. on the brief), for libelant-appellant.

Per Curiam. Petition for rehearing denied.

C. E. C., J. N. F., W. H. H., C.JJ.

Exhibit 3

FOR MAILING INSTRUCTIONS SEE REVERSE SIDE

Form US-302

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No.

INSURANCE

CARRIER'S No.

Employer's First Report to Deputy Commissioner of Accident or Occupational Disease

EMPLOYER

1. Employer's name Northern Dock Company
(Individual or firm name)
2. Office address Pier 3, River Street Hoboken, N. J.
(Street and number) (City or town)
3. Nature of business Stevedoring Terminal Operators
(Goods produced, work done or kind of trade or transportation)
4. Insurance carrier THE TRAVELERS INSURANCE COMPANY 5. When was carrier notified?

INJURED PERSON

6. Full name of injured person Blazey Chaplick 140-03-9711 His check No. 7924
7. Address: Street and No. 259 - 4th Street City or town Jersey City, N. J.
8. Sex male Age 60 Speak English? Yes If not, what language?
9. Injured person's regular occupation Longshoreman
10. Was he injured in regular occupation? Yes If not, occupation when injured
11. Wages or average earnings per day, \$ 10.00 per week, \$ 70.00 (Include overtime, bonuses, etc.)
12. Working days per week 5 Any other advantage?
13. Length of service in occupation 10 years Were full wages paid for day of injury?

THE INJURY

14. Place where injury occurred "U. Silvercloud" - Pier 3, River St. Hoboken, N. J.
(Give place and name of vessel)
15. Name of foreman A. Belloni
16. Date of accident or first illness Sept. 6, 1945 Last day worked Sept. 6, 1945
(Month, day, year) (Month, day, year)
17. When did you or your foreman first have knowledge of injury?
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Man was ascending steps to get over catwalk to 1st hatch. Steps were not fastened & they carried away - man fell & bruised right leg & left thigh.
(Immediate cause of alleged injury or disease)
19. Machine, tool, or thing in connection with which accident or disease occurred None
(If machine, indicate part)

INJURED PERSON

8. Sex male Age 60 Speak English? Yes If not, what language?
9. Injured person's regular occupation Longshoreman
10. Was he injured in regular occupation? Yes If not, occupation when injured
11. Wages or average earnings per day, \$ 10.00 per week, \$ 70.00 (Include overtime, bonuses, etc.)
12. Working days per week 5 Any other advantage?
13. Length of service in occupation 10 years Were full wages paid for day of injury?

THE INJURY

14. Place where injury occurred "U. Silvercloud" - Pier 3, River St. Hoboken, N. J.
(Give place and name of vessel)
15. Name of foreman A. Belloni
16. Date of accident or first illness Sept. 6, 1945 Last day worked Sept. 6, 1945
(Month, day, year) (Month, day, year)
17. When did you or your foreman first have knowledge of injury?
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Man was ascending steps to get over catwalk to 1st hatch. Steps were not fastened & they carried away - man fell & bruised right leg & left thigh.
(Immediate cause of alleged injury or disease)
19. Machine, tool, or thing in connection with which accident or disease occurred None
(If machine, indicate part)

NATURE AND EXTENT OF INJURY

20. Nature of injury or occupational disease Bruised legs
(State exactly the part of the person affected and the character of injury or disease)
21. Was member or part of member lost?
22. Will injury probably result in serious head or facial disfigurement?
23. Did injury cause loss of time? Yes If "yes," on what date? went home. 19
24. Has injured person returned to work? Yes If "yes," on what date? Sept. 11, 1945 19
25. Did you provide or authorize medical attention? Yes When?
26. Physician Dr. Londrigan - 832 Bloomfield St. Hoboken, N. J.
(Name) (Address)
27. Hospital None
(Name) (Address)

Dated Sept. 6, 1945, 19

Firm name Northern Dock Co.
(Signed) R. Hunt, timekeeper

(Official title)

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-311) must be made at the termination of disability, or at the end of fifteen days if disability had not then ended.

[fol. 132] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title omitted].

ORDER DENYING REHEARING—June 14, 1955

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed October 24, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Here follows 1 Photolithograph, side folio 135)

[fol. 140]

LIBELANT'S EXHIBIT 4

Case No. —

Insurance Carrier's No. B-5981165

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
Office of Deputy Commissioner —Administering Longshoremen's and Harbor Workers'
Compensation ActNotice to the Deputy Commissioner that Claim will be
Controverted(To be submitted in duplicate to Deputy Commissioner, who
will forward copy to Commission)

Note.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer: Northern Dock Co., Inc.
2. Office address: Street and No.: Pier 3, River St., City or town: Hoboken.
3. Name of injured person: Blazey Czaplicki.
4. Present address: Street and No.: 259 4th St., City or town: Jersey City.
5. Date of alleged accident or first illness: 9-6, 1945, 1:20 P.M.
6. Nature of alleged accident or occupational disease: Contusions of legs, elbow & left chest.
7. When was notice of injury received from employer? 9-11, 1945.
8. This case will be controverted for the following reasons:

- (a) For weekly wage? —
- (b) For rate of compensation? —
- (c) For period of disability? —

LEAVE THIS SPACE BLANK

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

CASE No.

65-438

INSURANCE
CARRIER'S No.

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED
PERSON

1. Name of employee Blazey Craplicki Employee's check No. 209
 2. Address: Street and No. 209 1st St City or town C. N.Y.
 3. Sex M Age 49 Married, single, widowed
 4. Do you speak English? Yes Nationality American
 5. State regular occupation Longshoreman
 6. What were you doing when injured? Same
 7. (a) Wages or average earnings per day, \$ 1.25 (Include overtime, board, rent, and other allowances.) (b) Per week, \$ 8.75 (c) Were you employed elsewhere during week in which you were injured? No (d) If so, state where and when

EMPLOYER

8. Were you paid full wages for day of accident?
 9. Employer Northern Dock Co
 10. Office address: Street and No. 17 Bellamy City or town Staten Island
 11. Nature of business Shed doors

THE
INJURY

12. Place where injury occurred On "H. Silvers" and "Kahaten" NY
 13. Name of foreman W. Bellamy (Give place and name of vessel)
 14. Date of accident or first illness, the 6 day of Sept, 1945, at 1 o'clock P
 15. How did accident happen or how was occupational disease caused?
Descending steps to get to hatch. Steps
slipped fell 4-5 ft hurting left leg

16. State fully nature of injury or occupational disease:

17. On what date did you stop work because of injury? Same day, 1945
 18. Have you returned to work? (Yes or No) No If "yes," on what date? 1, 1945

8. Were you paid full wages for day of accident?

EMPLOYER

9. Employer Northern Dock Co
 10. Office address: Street and No. 17 Bellamy City or town Staten Island
 11. Nature of business Shed doors

THE
INJURY

12. Place where injury occurred On "H. Silvers" and "Kahaten" NY
 13. Name of foreman W. Bellamy (Give place and name of vessel)
 14. Date of accident or first illness, the 6 day of Sept, 1945, at 1 o'clock P
 15. How did accident happen or how was occupational disease caused?
Descending steps to get to hatch. Steps
slipped fell 4-5 ft hurting left leg

16. State fully nature of injury or occupational disease:

17. On what date did you stop work because of injury? Same day, 1945
 18. Have you returned to work? (Yes or No) No If "yes," on what date? 1, 1945

NATURE
AND
EXTENT OF
INJURY

19. Does injury keep you from work? (Yes or No) Yes
 20. Have you done any work in period of disability? No
 21. Have you received any wages since injury? No If so, from and to what date?

22. Has injury resulted in amputation? If so, describe same

23. Did you request your employer to provide medical attendance? Yes Has he done so? Yes24. Attending physician: Name Dr. Rodriguez Address Staten Island25. Hospital: Name Staten Island Address Staten Island

NOTICE

26. Have you given your employer notice of injury? (Yes or No) Yes When? Same day, 194527. If such notice was given, to whom? Timekeeper28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

Blazey Craplicki

Claimant.

Dated

9/27

194

Mail address

(d) If controverted for any other reason, state fully below:

Injured is undecided whether or not to sue the 3rd party and reserves the right to controvert for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? —.

(Yes or No)

Name of Insurance Carrier: The Travelers Insurance Company.

Signed by: R. W. Bennett. Official title: Investigator.

Dated 9-17, 1945.

[fol. 141]

LIBELLANT'S EXHIBIT #5

65-438

Carrier's No. B-5081165

September 28, 1945.

Travelers Ins. Co.,
60 Park Place,
Newark, N.J.

Re: Blazey Czaplicki, Northern Dock Co., Inj. 9/6/45

Gentlemen:

Pursuant to Section 19 (b) of the Longshoremen's and Harbor Workers' Compensation Act, you are advised that the above claimant has filed a Claim for Compensation with this office, copy of which is enclosed.

Very truly yours, D. B. O'Keeffe, Claims Examiner.

DBO/ERC:
Enc.

[fol. 136]

LIBELANT'S EXHIBIT 2

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Second Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

BLAZEY CZAPLICKI, Claimant,

against

NORTHERN DOCK COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier

~~COMPENSATION ORDER~~

AWARD OF COMPENSATION

Case No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

Findings of Fact:

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud" which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach a catwalk leading to a hatch, the steps gave way and he fell about five feet in consequence of which he sustained a contusion and

[fol. 142]

LIBELANT'S EXHIBIT 6

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner, District 2

641 Washington Street, Corner Christopher Street

New York, N. Y. (14),

12/5/45.

File No. 65-438, D-5931165

Mr. Blazey Czaplicki.

Re: Blazey Czaplicki, Northern Dock Co., Inc., Inj. 9/6/45

GENTLEMEN:

In accordance with the medical findings and opinion in the enclosed report of examinations made by our Medical Advisor, it is requested that the recommendations in the paragraph or paragraphs hereinbelow identified with the letter (X) be carried out:

- ☐ That payment of compensation be continued.
- ☐ That further medical treatment be furnished the claimant.
- ☐ That further medical treatment be furnished the claimant after working hours or at such time as to not cause loss of time from work.
- ☐ That the claimant be kept under medical observation and periodic reports of the progress of the case be forwarded to this office.

. To Claimant

In view of the findings in the enclosed report of examination, the paragraph or paragraphs hereinbelow identified by the letter (X) indicate the action to be taken in your case.

- ☒ You have no further disability for work, and as there appears to be no permanent impairment your case will be closed, subject to the limitations of the Act.
- ☐ You are able to resume work but should return to this office in three months for a final medical exami-

nation to determine as to whether you have any permanent impairment.

Very truly yours, D. B. O'Keeffe, Claims Examiner.

"CP. 3/11. Says working only a day or two a week pain left hip."

[fol. 143] RESPONDENT HAMILTON'S EXHIBIT A

Memorandum for the File

September 28, 1945.

File #65-438

Re: Blazey Czaplicki, Northern Dock Co., Inj. 9/6/45
Compensation payments have been withheld in this case by the carrier because of the possibility of the injury having been caused by the negligence of a third party.

The claimant called on September 27, 1945, and the provisions of Section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

He filed a Claim for Compensation and a formal order will be issued accordingly.

D. B. O'Keeffe, Claims Examiner.

DBG/ERC.

(6713-2).

abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to \$1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at \$22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to \$45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at \$22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of \$45.00, and shall continue payments thereafter in bi-weekly installments at \$22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 641 Washington Street, New York City, this 28th day of September, 1945.

Louis G. Schwartz, Deputy Commissioner, Second Compensation District.

[fol. 75]

LIBELANT'S EXHIBIT 7

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

A 173-173

BLAZEY CZAPLICKI, Libellant,

against

SS. HOEGH SILVERCLOUD, her boilers, engines, tackle,
apparel and furniture,

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR
of the Royal Norwegian Government, doing business
under the name and style of The Norwegian Shipping
and Trade Mission, Kerr Steamship Company, Inc., and
Hamilton Marine Contracting Company, Inc., Respond-
ents.

Deposition of Travelers Insurance Company, by Gene
Innocenti, on behalf of the libellant, at the United States
Court-House, Foley Square, New York, N. Y., on June
25, 1953, at 2:30 o'clock P. M., pursuant to notice dated
January 12, 1953.

Appearances:

Nathan Baker, Esq., Proctor for libellant.

Galli & Locker, Esqs., Proctors for respondent Hamil-
ton Marine Contracting Company, Inc., by Royce A. Wil-
son, Esq., advocate.

[fol. 76] It is hereby stipulated and agreed by and between
the proctors for the respective parties hereto that sign-
ing, sealing, filing, and certification of the within deposi-
tion are hereby waived;

It is further stipulated and agreed that all objections
except as to the form of the questions are hereby reserved
to the time of the trial;

It is further stipulated and agreed that a copy of the
said deposition shall be furnished to the adverse parties
without cost to them.

[fol. 138]

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Glazey Czaplicki, 259 4th Street, Jersey City, N.J.
Northern Dock Company, Pier 3, River Street, Hoboken, N.J.

Travelers Insurance Company, 60 Park Place, Newark, N.J.

D. B. O'Keeffe, Claims Examiner.

Mailed September 28, 1945.

Mr. Wilson: Royce A. Wilson objected to Mr. Baker examining the file which he had subpoenaed and by agreement of counsel they appeared before Judge Dimock in his chambers, Room 1903, of this court.

Upon appearing before Judge Dimock, Mr. Wilson submitted a copy of the memorandum of Judge Sugarman, dated December 11, 1952, in this matter. Mr. Wilson explained to the Court that by his conversation with Mr. Baker it was apparent that what Mr. Baker was to inquire into were the circumstances under which the libellant [fol. 77] in this case had elected to accept compensation.

In respect to this, Mr. Wilson contended that the order in the compensation matter was not subject to collateral attack in this action, and therefore not properly the subject of inquiry on the part of Mr. Baker.

After hearing both counsel, Judge Dimock stated that he felt no harm could come from giving Mr. Baker what he sought in this examination and that there would be no waiver on the part of Mr. Wilson's client of the defenses interposed in the answer by virtue of acceding to the information sought by the subpoena.

By agreement of counsel, it was decided that this statement should be dictated into the minutes of this examination in order that it would be properly a part of this record.

Mr. Baker: In so far as I am concerned, it is my understanding that it was to be placed on the record a statement to show that Mr. Wilson objected to my seeing the file of Travelers Insurance Company and that the Court ruled that I could see the file and that this would not [fol. 78] constitute any waiver in so far as the defendant or the Travelers Insurance Company was concerned.

Mr. Wilson: By direction of Judge Dimock, there were three papers in this file which Mr. Baker was permitted to make copies of or otherwise question the custodian of the file, namely:

1. The investigation report.
2. The investigation report continued; and
3. The unsigned statement of the claimant, the libellant, in this case.

JENE INNOCENTI, called as a witness by the libellant, having first been duly sworn by the notary public, testified as follows:

Examination by Mr. Baker:

Q. Mr. Innocenti, what is your position with the Travelers Insurance Company?

A. I am a claim adjuster.

Q. And connected with what office?

A. The Newark Branch Office of the Travelers Insurance Company.

Q. And have you appeared at the taking of this deposition of Travelers Insurance Company pursuant to a subpoena served upon the Travelers Insurance Company to produce the records of the matter of Blazey Czaplicki [fol. 79] vs. The Northern Dock Company?

A. Yes, I am here in answer to that subpoena.

Q. Who investigated this claim in so far as these records show?

A. Richard Bennett.

Q. And was he an employee of the Travelers Insurance Company?

A. Yes, he was.

Q. Is he still employed in the Travelers Insurance Company?

A. Yes, he is.

Q. Where is he now located?

A. He is now located with the Perth Amboy Branch.

Q. Did you have anything to do with the handling of this claim of Blazey Czaplicki?

A. No.

Q. So that you have no personal knowledge of it?

A. That is right.

Q. Does the file disclose who appeared at the hearing in the Compensation Commission?

A. I don't know.

Q. Could you tell me from examining this file what representative of the Travelers Insurance Company was present when there was a compensation award made in [fol. 80] the United States Compensation Commission under date of September 28, 1945?

Mr. Wilson: Objected to on the ground that it assumes something which is not in evidence. It assumes that there was someone present at the time.

The Witness: No.

Q. Well, do you personally know who was present?

Mr. Wilson: Objected to on the ground that it assumes someone was present.

A. No.

Q. Who was in charge of handling the compensation file as of September, 1945, on behalf of the Travelers Insurance Company?

A. Mr. Burton was in charge of all compensation cases in the Newark office.

Q. Now, in accordance with this yellow sheet—what do you call that, by the way?

A. That is called a registration and report of investigation.

Q. And from the statement of "Cause of Action," would you read that?

A. (Reading:) "Ascending steps to get over catwalk to No. 1 hatch. Steps were not fastened and they carried away. Man fell."

Q. And on this yellow sheet is printed the following: [fol. 81] "Is right of subrogation involved?" What was the answer on that?

A. Yes.

Q. And what does that indicate in so far as your experience in—

Mr. Wilson: No. That I object to.

Q. Would you read the narrative report as to the cause and description of accident?

A. (Reading) "On 9/6/45 about 1:20 p. m., returning from lunch on ship on way to his job man climbed a temporary flight of steps to get over the catwalk to the hatch. These steps had been made by outside contractor and were put in place by somebody, either employees of the outside contractor or members of the crew, not known, sometime between 12 and 1 when the longshoremen were out for lunch. Neither the ship, the SS Hoegh Silvercloud nor the outside contractor are now at the pier, so further investigation could not be made. Other men walking ahead

of claimant had used the steps but when claimant got to the top of the steps they pulled away and claimant "fell a distance of about five feet. These steps had not been fastened in any way."

Mr. Wilson: May we put this on the record: Mr. Baker peruses yellow sheet with witness and asks witness to [fol. 82] read that which follows the caption "Claimant"?

The Witness: "Claimant—Polish, sixty years old, married, no dependent children, about six feet, weighing 250 pounds; speaks broken English; owns his own home; married daughter lives on upper floor; friendly; is undecided at the present time whether to sue the third party or to accept compensation, but his daughter——"

Mr. Wilson: Witness continues reading from white sheet, the same being captioned "R. & RO-1, continued."

The Witness (continuing reading): "but his daughter is very much in favor of bringing suit. Unsigned statement is attached."

Q. All right, subrogation.

A. (Reading) "Subrogation—He said contractor was the Hamilton Marine Contracting Company, of Brooklyn, the SS Hoegh Silvercloud is leased by Kerr Steamship Lines.

"Remarks: Claimant will inform us if he desires compensation. He was instructed through his daughter to contact the USC when he had made his decision whether or not to sue the third party.

"Form 207 to USC, copy attached.

[fol. 83] "Submitted for review:

"Dated 9-17-45," and signed "R. Bennett."

Q. Would you read the unsigned statement of the claimant, Czaplicki?

A. (Reading) "I, Blazey Czaplicki, age sixty, married, no dependent children, living at 259—Fourth Street, Jersey City, state the following:

"On September 6, 1945, I was working on board a ship at Pier 3, Hoboken, and working for Northern Dock Company. About 1:20 p. m. I came back from lunch and was about to start work again. There was a lot of lumber piled around on the deck and some carpenters working for some other company had built a flight of wooden steps

and these steps were in place to get over the catwalk to the hatch.

"The steps were not there when I went out for lunch. I saw other men use these steps ahead of me, so I went up the steps. I am a heavy man and when I got to the top of the steps they broke or slipped away and I fell down about five feet.

"I thought that these steps were nailed or fastened in place, but they weren't.

"I do not know who put the steps there, but I think it was the carpenters.

[fol. 84] "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I do not want to bother to sue anybody.

"I have been a longshoreman since 1930, and before that I worked for the Penn Railroad for fourteen years.

"The only other accident I have had was to my left thumb.

"The only parts of me that were hurt in this accident were my left hip and leg, my left elbow, my right leg, and the left side of my chest.

"Refused to sign.

"Taken by R. Bennett at Jersey City, New Jersey, on September 17, 1945."

Q. This unsigned statement that you read you have indicated was taken by Mr. Bennett, according to the record?

A. I did already.

Q. Now, in this file which has been produced there is there a first notice of accident form?

A. Yes.

Q. And what does that report state concerning the accident?

(Discussion off the record.)

Mr. Baker: The witness reading in part from the paper referred to.

A. (Reading) "An outside contractor (Hamilton Marine Contracting Co.) who was installing wood cargo bins

on deck had fabricated a wood flight of steps but had not yet secured them.

"Between 12 and 1 p. m. a member of the ship's crew placed the steps against the bin.

"The claimant (a very heavy man) walked on steps, which gave way; and he fell, going to No. 1 hatch on top deck."

[fol. 86] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

A 173-113

BLAZEY CZAPLICKI, Libelant,

against

SS. HØEGH SILVERCLOUD, her boilers, engines, tackle,
apparel and furniture,

and against

OLVIND LØRENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR
of the Royal Norwegian Government, doing business
under the name and style of The Norwegian Shipping
and Trade Mission, Kerr Steamship Company, Inc., and
Hamilton Marine Contracting Company, Inc., Respond-
ents.

NOTICE OF TAKING DEPOSITIONS.

SIRS.

Please take notice that pursuant to Admiralty Rule 32C for the District Courts of the United States, the libelant will take the deposition upon oral examination of Travelers Insurance Company, by its officer or managing agent, and its representative who was present when the compensation award was made in the United States Compensation Commission under date of September 28, 1945, concerning the accident to Blazej Czaplicki while employed by Northern Dock Company on September 6, 1945, to be examined with respect to any matter which is relevant to the subject matter involved in the pending action; including the existence, description, nature, custody, condition and location

of any books, documents, correspondence or other tangible things and the identity and location of persons having knowledge of relevant facts; said deposition to be taken before some officer or person authorized by law to take such deposition, at the Calendar Commissioner's office, Federal Court House, Foley Square, Borough of Manhattan, City of New York, on the 6th day of February, 1953, at 3:00 p.m. and from day to day thereafter until the examination is concluded:

Dated: January 12, 1953, New York, N. Y.

Yours, etc.

Nathan Baker, Proctor for libelant, Office and P.O. Address, 1 Newark St., Hoboken, N. J., and 401 Broadway, New York City.

To:

Haight, Deining, Gardner, Poof & Havens, Esqs., Proctors for respondents, Kerr Steamship Co. Inc., Oivind Lorentzen, etc, 80 Broad St., New York City.

Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York City.

(7632-3)